No. 82-1616
IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

LAWRENCE J. GALARDI,
DEAN F. COCHRAN,
20600 Eagle Pass Drive,
Malibu, Calif. 90265,
(213) 456-6688,
Attorneys for Respondent Mills Manufacturing Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether the United States Air Force has authority under Exemption 5 of the Freedom of Information Act, (5 U.S.C. 552(b)(5), to withhold non-classified factual witness statements made to an Air Force Safety Investigation Board?

Parties to These Proceedings.

Petitioner is the United States of America. Respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to These Proceedings	i
Preliminary Statement	1
Background	1
Respondent's Statement of Pertinent Facts	2
Reasons for Denying the Petition	5
I.	
The Court of Appeals Correctly Interpreted and Applied This Court's Decision in Merrill	5
II.	
There Is No Support in the Legislative 2History for Refusing Disclosure Under Exemption 5	14
III.	
Petitioner Has Failed to Conclusively Establish a Factual Basis for the Privilege Asserted	17
Summary of Argument	19
Conclusion	20

TABLE OF AUTHORITIES

Cases — Page

Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975) 5

Cooper v. Department of the Navy, 558 F.2d 274 (5th Cir. 1977) 5

Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975) 15, 16

Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979) 5, 6, 7, 8, 9, 10, 13, 14, 17, 20

Government Land Bank v. GSA, 671 F.2d 663 (1st Cir. 1982) 13, 14, 16

Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. den., 375 U.S. 896 (1963) 5

Miscellaneous

1976 U.S. Code Cong. and Adm. News, pp. 2260-2261 16

Regulation

Air Force Regulation 127-4 17

Rule

Federal Rules of Civil Procedure, Rule 26(c)(7) ... 5, 6

Statutes

Freedom of Information Act, Exemption 1 15

Freedom of Information Act, Exemption 3 .... 12, 15, 16

Freedom of Information Act, Exemption 4 14

Freedom of Information Act, Exemption 5 (5 U.S.C. §552(b)(5)) ..... i, 2, 5, 6, 10, 11 .....12, 13, 14, 15, 16, 20

Page

Freedom of Information Act, Exemption 5(c) (5 U.S.C. §552(c)) 15
Freedom of Information Act, Exemption 7(d) 14, 15
United States Code, Title 5, Sec. 552 et seq. 2
United States Code, Title 5, Sec. 552(a)(4)(B) 1
United States Code, Title 10, Sec. 2304(a)(10) 12
United States Code, Title 10, Sec. 2304(a)(12) 12
United States Code, Title 10, Sec. 2305(c) 12
United States Code, Title 41, Sec. 253(b) 12

No. 82-1616

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Mills Manufacturing Corporation responds to the Government's Petition for a Writ of Certiorari and suggests the Petition be denied, or, if granted, that the Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Preliminary Statement.

Respondent concurs with Petitioner's Statement of the Opinions below; the matters relating to Jurisdiction and the Statute involved, to wit, 5 U.S.C. 552(a)(4)(B); and, 5 U.S.C. 552(b)(5).

Background.

In the pending underlying case styled *Richard D. Hoover v. Weber Aircraft Corporation, etc., et al.*, (CV-74-1064-WPG, U.S.D.C. Central District of California) plaintiff seeks

recovery for damages for injuries sustained when he ejected from an Air Force aircraft after experiencing a flame-out (a complete engine loss, and failure of re-start). Plaintiff, HOOVER sued WEBER and MILLS, the initial designer of the parachute pack and harness assembly, and the manufacturer of the canopy, respectively, along with the designers of the various component parts of the parachute pack and harness assembly. There are five defendants in the related litigation. Each has a serious valid purpose for pressing for disclosure and a direct and substantial interest in the outcome of these proceedings.

WEBER and MILLS sued the United States to compel disclosure under the Freedom of Information Act, 5 U.S.C. 552, et seq. The District Court held the Government was authorized to withhold the documents by Exemption 5, (5 U.S.C. 552(b)(5)), and by traditional equity principles. The Court of Appeals reversed and remanded. A petition for rehearing with a suggestion for rehearing *en banc* was denied with no Judge of the Court requesting a vote thereon; and, Petitioner here seeks certiorari.

Respondent's Statement of Pertinent Facts.

The incident in which the injuries were sustained occurred on October 9, 1973. HOOVER was involved in a routine training mission with a student pilot operating an Air Force fighter aircraft known as an F-106B. Both HOOVER and the student pilot ejected from the aircraft. HOOVER alleges his injuries were caused by failure of his parachute equipment. The student pilot sustained no serious injuries.

The Air Force concluded, during the course of its investigation, that HOOVER's injuries were the result of an "extremely hard parachute landing or undeployed survival kit".

The theories urged in the related litigation range from defective stitching in the parachute pack to fouling of the

pilot chute, fouling the shroud lines, deficiencies in the design and manufacture of the speed connector links, and entanglement. HOOVER has not sued the manufacturer of the aircraft, the manufacturer of the engine, or most significantly here, the designer and manufacturer of the survival kit and related deployment assembly.

Thus electing to not proceed against the designer and manufacturer of the survival kit and automatic deployment assembly appears to be a decision on the part of HOOVER to avoid the issue of *Air Force personnel error* as an intervening and supervening cause of the injuries.

The Air Force documents that bear on the evidence of *Air Force personnel error* are the subject of this appeal.

Petitioner has nowhere urged the training flight or procedures or equipment involved were secret or confidential because of matters of national defense. None of the materials sought deal with matters of national security, and all of the mechanisms and assemblies, the design plans and the manufacturing criteria for the equipment, are in the public domain. There is no issue of commercial privilege.

The investigations of the Air Force were undertaken, completed and reported pursuant to the Air Force regulations discussed and summarized in pertinent part in the Court of Appeals opinion. (Petitioner's Appendix A, pp. 2a-4a and notes 2 and 3.) Neither the regulations relied upon by Petitioner nor the record in the Court below factually support Petitioner's claim that these witness statements were provided after and upon promises of confidentiality. The Court of Appeals invited Petitioner furnish either authority or evidence of Record, on that issue, following oral argument, however, nothing was forthcoming other than reference to the already submitted conclusory affidavits filed in the Trial Court in support of the Motion for Summary Judgment.

The information the Government refuses to disclose are statements made by HOOVER to the Air Force Accident Investigation Board and the President of the Board and the statements of Airman Dickson to the Board relating to what he did or failed to do during the course of rigging HOOVER's equipment. Dickson was the last person to have had anything to do with HOOVER's equipment, including the survival kit and automatic deployment assembly which failed to deploy, before the accident.

The allegedly defective "speed link" has never been found. The rest of HOOVER's parachute equipment, including the other components alleged to be defective, was lost or destroyed by Air Force personnel soon after the accident, and before Respondent or any of the other defendants in the underlying litigation had any knowledge of the accident or any knowledge that HOOVER intended to sue for damages. The defendants in the HOOVER litigation, including Respondent, have therefore never seen and will never be able to see any of the allegedly defective equipment.

The evidence of HOOVER and Dickson given to the Accident Investigation Board is critical to the final determination of the most critical factual issues in the underlying litgation; and, the Government refuses to produce it.

REASONS FOR DENYING THE PETITION.

I.

The Court of Appeals Correctly Interpreted and Applied This Court's Decision in *Merrill*.

Petitioner urges the Circuit Court's interpretation and application of *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979) is "patently erroneous". *Merrill*, however, clearly stands for the rule that Exemption 5 includes only those privileges which are explicitly recognized in the legislative history of the Act. It is equally clear the Court of Appeals thus interpreted *Merrill* and applied that conclusion in rejecting Petitioner's reliance upon *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds 594 F.2d 484, cert. den., 444 U.S. 926 (1979); and, *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

In applying its analysis of *Merrill* the Court below pointed to reliance in both the Fifth Circuit and Eighth Circuit upon *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. den., 375 U.S. 896 (1963). The *Machin* Court reasoned the civil discovery privilege exempted witness statements given to Aircraft Accident Investigation Boards from disclosure concluding they were unavailable by law and for that reason, the Fifth and Eighth Circuits protected and exempted them by Exemption 5. The Court of Appeals held, however, there was no evidence in the legislative history that Congress intended Exemption 5 to protect the statements of witnesses from disclosure.[1]

---

[1]This Court explicitly recognized the assertion of the *Machin* privilege in *Merrill* as one of three theories advanced there and after specifically contemplating both, it flatly rejected one theory (Federal Agencies "general authority" to delay disclosure (443 U.S. at p. 353, 99 S.Ct. at p. 2808)) and concluded the limited commercial privilege set forth in F.R.C.P. 26(c)(7) was the most plausible theory advanced by

(footnote continued on following page)

Petitioner attacks that rationale and the conclusions of the Court of Appeals and its criticism resolves itself into three arguments. They are: First: Petitioner asserts the Court of Appeals has "twisted" and "distorted" the language of this Court when the Court of Appeals said Exemption 5 includes only those privileges which are "explicitly recognized", rather than utilize this Court's phraseology, "specifically contemplated", by the legislative history; second: Petitioner asserts this Court did not find the limited privilege for commercial information involved in the *Merrill* case to be "explicitly recognized" in the legislative history, but instead, relied upon "inference" and upon "analogy", from the legislative history; and, third: the Court of Appeals erroneously, (according to Petitioner) concluded that under *Merrill* factual information is not subject to any privilege included within Exemption 5. Petitioner asserts the privilege found by this Court in *Merrill* specifically includes purely factual information.

Respondent Mills respectfully urges each of these contentions is wholly incorrect.

---

the Government. That limited privilege was included on that basis. The *Machin* argument, however, fairly characterized as "less plausible", was not addressed further. The Court said: "In light of our disposition of this case [Confidential commercial information is protected by F.R.C.P. 26(c)(7) and Exemption 5] we do not consider whether either asserted privilege is incorporated in Exemption 5." 443 U.S. at page 355, fn. 17, 99 S.Ct. at page 2810, fn. 17. Against that background it is, we submit, an overstatement to say this Court "expressly left open the question whether Exemption 5 incorporates the *Machin* privilege;" (the footnote observation of the Court of Appeals relied upon by Petitioner, to the contrary notwithstanding). We do not believe that issue was reached in *Merrill* once reliance upon F.R.C.P. 26(c)(7) was comfortably, clearly and ultimately found to be within Exemption 5.

The footnote reference of the Court of Appeals (Petitioner's Appendix, p. 8a, fn. 6) is clearly a reference to this Court's note 17 in *Merrill*, and as aforesaid, that note indicates only that *Machin* was not reached for decision as the matter was decided on other grounds.

To begin with, in the context of *Merrill* and the instant case, it is impossible as a matter of ordinary English usage to perceive any rational distinction between the phrase "explicitly recognized" and the phrase "specifically contemplated".

We ask the Court consider for the moment a real life circumstance of two attorneys discussing whether their mutual client had thoroughly understood a contract they had reviewed in his behalf. The senior attorney in our example might be heard to inquire "did Mr. Merrill *explicitly recognize* that he may have a substantial exposure to liquidated damages if his deliveries are delayed by bad weather?" Ordinary English usage compels we conclude it would be appropriate for the junior attorney to respond: "Yes, he *specifically contemplated* that possibility." Petitioner's tortuous pursuit of the construction it places on that phraseology would require the junior attorney reply, however: "No, the client did not *explicitly recognize* that possibility, but he did *specifically contemplate* it." The Court of Appeals did not in any sense alter the meaning of this Court's language in *Merrill* when it addressed the legislative history and sought to characterize what the Congress intended to incorporate in Exemption 5 and to suggest otherwise appears to be a mere semantic quibble.

Petitioner is equally in error when it contends this Court did not find explicit recognition of the *Merrill* privilege in the legislative history, but, instead merely relied upon "inferences" and "analogies" drawn from the legislative history. Petitioner relies upon a truncated portion of one sentence from this Court's opinion in *Merrill*, which, Respondent submits, was taken out of context.

The Government's incomplete quotation appears on page 13 of Petitioner's brief. It reads:

> "[W]e think it is reasonable to infer that the House Report . . . specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts." (Verbatim from Petition, page 13.)

The actual context, however, in which Petitioner's abbreviated quotation appears, is as follows:

At 443 U.S. 357-359, this Court mentioned in substantial detail that, during the legislative hearings on the Freedom of Information Act, representatives from the Department of Defense, the General Services Administration, the Post Office, and the Treasury Department, had appeared before Congressional committees and testified at length as to the need for the kind of commercial privilege which the Court found in *Merrill*.

Then, at 443 U.S. 359, this Court quoted the following passage from a House Committee Report which had been adopted *after* the conclusion of the hearings at which the aforesaid agency representatives had given testimony:

> "Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision, or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy." (Emphasis as in Court's opinion.)

Then, at 443 U.S. 359 the Court uttered the sentence which Petitioner has quoted only in part on page 13 of its Petition, as mentioned above. The full sentence, as it appears in the Court's opinion, reads:

> "In light of the complaints registered by the agencies about premature disclosure of information relating to

> government contracts, we think it is reasonable to infer that the House Report, in referring to 'information . . . generated [in] the process of awarding a contract' specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts."

In light of the total context, it is apparent the Court's words "we think it is reasonable to infer . . .", must, as a matter of common sense, be taken to mean that *it would clearly be unreasonable to infer anything else*; in short, that the Court clearly found explicit, specific, Congressional intent for the *Merrill* privilege. The Court was not therefore, as Petitioner suggests, engaging in some sort of creative exercise based on mere "inference" and "analogy".

Petitioner's references to the word "analogy", on page 13 and elsewhere in its Petition, represent another instance of divorcing particular words and phrases from their context. In this connection, the precise setting in which this Court, in *Merrill*, used the word "analogy", appears at 443 U.S. 361-362; and it reads:

> "Although the *analogy* is not exact, we think that the domestic policy directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract. During the month that the directives provide guidance to the Account Manager, they are surely confidential, and the information is confidential in nature because it relates to the buying and selling of securities in the open market. Moreover, the directives and associated tolerance ranges are generated in the course of providing ongoing direction to the Account Manager in the execution of large scale transactions in government securities; they are, in this sense, the Government's buy-sell order to its broker." (Emphasis added.)

Again, when the Court's language is read in proper context, it is apparent the Court was not merely engaging in creative endeavors based on "inference" and "analogy", but had found an analogy so compelling it left no doubt as to the intent of Congress to include the *Merrill* privilege in Exemption 5. This view of the matter is unassailable when consideration is given to the language of the Court appearing at 433 U.S. 352, in which, in a portion of the *Merrill* opinion to be discussed more fully immediately hereafter, the Court said:

> ". . . [The] domestic policy directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract. . . ."

This is surely more than mere analogy.

Finally, Petitioner mischaracterizes, or at least misunderstands this Court's opinion in *Merrill* and the opinion of the Court of Appeals in the instant case where it argues the Court of Appeals went *contra* to the teaching of *Merrill* when it held that purely factual information is not shielded by Exemption 5. In this connection, Petitioner asserts the *Merrill* privilege is specifically intended to include purely factual information. (See, *e.g.*, Petition, pp. 13 and 14.)

In so arguing, Petitioner wholly ignores the instructions this Court issued to the District Court at the conclusion of the *Merrill* opinion. At that juncture in the Court's opinion, the sentence from which we made the partial quotation in the preceding paragraph appears. The full sentence (443 U.S. at 362) reads:

> "Although the domestic policy directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract, it does not necessarily follow that they are protected against immediate disclosure in the civil discovery process."

This Court then ordered remand of the case to the District Court for further proceedings to determine two things: First: whether, as a matter of fact, the public interest truly justified the delayed release of the Domestic Policy Directives which the Government contended was essential in the public interest; and, second: if such public interest existed, whether the "purely descriptive" portions of the Domestic Policy Directives could be severed from the "operative" portions and released immediately.

In this context, it is obvious that, in its reference to the "purely descriptive" portions of the Domestic Policy Directives, this Court had in mind precisely the same kind of material which the Court of Appeals chose to characterize as *purely factual* material. It must be concluded therefore, that there is clearly no conflict between this Court and the Court of Appeals as to the status of *purely factual* material under Exemption 5.

Finally, the examples given by Petitioner at page 14 of the Petition, to justify its contrary contentions, are wide of the mark. The examples there offered by Petitioner in support of its argument that Exemption 5 shields purely factual material, are bids on government contracts, and appraisals of real estate the Government intends to sell.

First, as to *bids*, it is immediately apparent they are not subject to Exemption 5, because they are not "inter-agency or intra-agency memorandums or letters". Instead, they are documents independently prepared and submitted to the Government by private parties outside the Government. Moreover, it is specifically required by statutes other than the Freedom of Information Act that bids be kept sealed, and *not disclosed to anyone* inside or outside of Government, until the exact time (and at the exact place) advertised

by the Government as the time and place for bid opening, at which time (and place) the bids must be *publicly* opened. (See, *10 U.S.C. 2305(c)*, applicable to all defense agencies; and, *41 U.S.C. 253(b)*, applicable to all civilian agencies.) Thus, prior to bid-opening, bids are protected from disclosure by the foregoing statutory provisions in tandem with Exemption 3 of the Freedom of Information Act, permitting information to be withheld when withholding is required by some other statute which leaves no discretion on the issue. Again, it is noted that Exemption 5 has nothing whatever to do with the case. At the time of bid-opening, by virtue of the statutory requirement, *supra*, that bids be publicly opened, they become public information, and cannot be withheld under any of the exemptions of the Freedom of Information Act, even though bids may be, and ofter are, the subject of intra-agency or inter-agency deliberations for a substantial period of time between bid-opening and the ultimate award of a contract.[2]

As for *appraisals*, it is obvious, first, that appraisals are never "purely factual" documents. They are essentially opinions, based upon the knowledge, professional skills, expertise, and experience of the particular appraiser. It is

---

[2]Where the statutory requirement of public bid openings would compromise military secrets or other classified information, or would deter prospective contractors from submitting bids because of unwillingness to make public disclosure of trade secrets or other confidential commercial information, the Government is authorized by statute to dispense with the requirement of sealed bids and public bid openings, and to place contracts through negotiation with individual offerors. As to defense contracts, see, *10 U.S.C. 2304(a)(10), and (12)*. As to contracts with civilian agencies, see, *41 U.S.C. 252(c)(10) and (12)*. In such cases, the offers can be withheld from disclosure under Exemptions 1 and 4 of the Freedom of Information Act, in tandem with the foregoing statutory provisions, and also possibly in tandem with Exemption 3 of the Freedom of Information Act. Again, Exemption 5 has nothing to do with the case. The offers, as in the case of bids, are not "inter-agency or intra-agency memorandums or letters", and, as noted, they are covered by exemptions other than Exemption 5.

conceivable that a particular appraisal might contain purely factual or purely descriptive portions which could be segregated from its opinion portions. If that were the case, no reason appears why the purely factual or purely descriptive portions would be shielded from disclosure by Exemption 5. The clear teaching of *Merrill* is that they would not be shielded by Exemption 5.

There is nothing to the contrary in the case of *Government Land Bank v. GSA*, 671 F.2d 663 (1st Cir. 1982), (cited on p. 14 of the Petition) as pertaining to appraisals. That case involved an attempt by a prospective purchaser of land from the General Services Administration to obtain GSA's appraisal of the land so that it could drive a hard bargain with GSA. The prospective buyer was clearly not interested in obtaining only purely factual or descriptive material. It wanted the whole appraisal to strengthen its position in negotiations. The case did not hold that purely factual or descriptive material is protected by Exemption 5, nor did it say that this Court had so held in *Merrill*. In fact, that Court's understanding of *Merrill* was substantially the same as the understanding of the Court of Appeals in the instant case. The following language from the *Government Land Bank* opinion is dispositive:

> "The test is not whether FOIA is being used to circumvent the discovery process. The test is whether the document (1) *falls within an area of clear Congressional concern* and (2) is not the sort of material that private litigants can get as a matter of course. Since *Merrill identified a Congressional concern that clearly encompasses* this appraisal, and since it is not the sort of document routinely disclosed to litigants, the test would seem to be met." (Emphasis added.) (671 F.2d at p. 666).

II.

There Is No Support in the Legislative History for Refusing Disclosure Under Exemption 5.

Given the teaching of *Merrill* that Exemption 5 will not be construed to include a privilege unless there is evidence that Congress, to use this Court's phraseology *specifically contemplated* that privilege, or, to use the phraseology of the Court of Appeals, *explicitly recognized* such a privilege, or, as said by the First Circuit in the case of *Government Land Bank v. GSA, supra*, that the privilege "falls within an area of clear Congressional concern", it plainly appears the Court of Appeals reached the correct result in this case.

Nowhere in the legislative history of the Freedom of Information Act is there any evidence that Congress "specifically contemplated" or "explicitly recognized" any privilege under Exemption 5 for factual statements given to Air Force Safety Investigation Boards under a promise of confidentiality; nor is there any evidence in the legislative history that the protection of such statements from disclosure "falls within an area of clear Congressional concern."

The only exemptions in the Act which specifically refer to confidentiality are the provisions of Exemption 7(d) which authorize the withholding of records compiled for law enforcement purposes, to the extent their disclosure would disclose the identity of a confidential source, or, "in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source . . ."; and, Exemption 4, authorizing nondisclosure of confidential trade secrets and commercial or financial information obtained from a person outside of Government.

The only exemptions which do not mention confidentiality expressly, but which would seem to authorize withholding of statements given under a promise of confidentiality in proper circumstances, are Exemption 1, allowing the withholding of statements specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and, in fact, properly classified pursuant to such Executive Order; and, Exemption 3, permitting nondisclosure of statements specifically exempted from disclosure by statute, *other than the Freedom of Information Act*, when such statute leaves no discretion on the issue of disclosure or establishes particular criteria for withholding information, or refers to particular types of information to be withheld.

Given the fact that Congress has expressly provided for promises of confidentiality in the specific areas covered by Exemptions 1, 3 and 7(d), and given the fact that neither the express wording nor the legislative history of Exemption 5 shows any evidence of *specific Congressional contemplation*, or *explicit Congressional recognition*, or *clear Congressional concern* with purely factual statements made to Air Force Safety Investigation Boards under promises of confidentiality, it must be concluded that Exemption 5 contains no such privilege.

Any other conclusion would clearly violate the intent of Subsection (c) of the Act, 5 U.S.C. 552(c), which reads, in pertinent part, as follows:

> "This section [meaning the Act, as a whole] does not authorize withholding of information or limit the availability of records to the public except as specifically stated in this section."

The Congressional response to this Court's decision in the case of *Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975), would seem to shed further light on

the pertinent legislative intent. In *Robertson*, this Court found a privilege for statements given by airline company personnel to the Federal Aviation Administrator. There, Civilian Aviation Safety was the subject matter addressed. The rationale by which the Administrator and this Court justified the privilege was substantially the same as the rationale advanced by Petitioner in the instant case in support of a comparable privilege for military aviation safety. See 422 U.S. at pages 266, 267. The particular Freedom of Information Act exemption relied upon in that case, however, was Exemption 3, as it was then written; not Exemption 5. At that time, the wording of Exemption 3 simply authorized withholding of information pursuant to a statute, and did not contain the requirements of Exemption 3 as it is presently written, requiring the statute leave no discretion on the issue, or the statute establish particular criteria for withholding information, or refer to particular types of information to be withheld.

The *legislative response* to that decision was to rewrite Exemption 3 in the form in which it *now* exists. The legislative history explaining the amendment states expressly that the legislative intent was to overrule *Federal Aviation Administration v. Robertson, supra*. 1976 *U.S. Code Cong. and Adm. News*, pp. 2260-2261.

In this context, it is submitted that, in rewriting Exemption 3 in its present form for the purpose of overruling the *Robertson* case, Congress very clearly said exactly what this Court said in *Merrill*, and the Court of Appeals said in the instant case, and the First Circuit said in the *Government Land Bank* case, *supra*; namely, that Congress did not intend to include any privileges in the Freedom of Information Act, unless there was clear evidence that *Congress specifically contemplated*, or *explicitly recognized* or *was clearly concerned* with the privilege in question.

It plainly appears therefore, that the Court of Appeals correctly applied the teaching of *Merrill* to the facts of the instant case.

III.

Petitioner Has Failed to Conclusively Establish a Factual Basis for the Privilege Asserted.

Given the importance of aviation safety in our Air Force, both in human terms and in terms of national defense, Petitioner's vigorous advocacy is understandable, but, there is another side to the issue and because of that, the need for confidentiality can not be accepted as conclusively established.

Petitioner quotes from the Affidavit of the Commander of the Air Force Inspection and Safety Center. The relied upon excerpt recognizes an alternative to confidentiality, namely, *subpoena power*. General Russell concluded:

> "Lacking authority to subpoena witnesses, accident investigators must rely on such assurances [of confidentiality] in order to obtain full and frank discussion concerning all the circumstances surrounding an accident." (Affidavit of Maj. Gen. Len C. Russell; See, Petition, p. 5.)

In support of subpoena power, *which Congress could readily provide*, it must be noted that, although confidentiality may (arguably) promote full and frank discussion, it can also have the effect of concealing information which could and should be made available to the public, to Congress, to the Comptroller General, and indeed, to the Secretary of Defense, himself, all of whom would be excluded or could be excluded from access to any such information if the privilege asserted by Petitioner really exists. (See, A.F. Reg. 127-4, as set forth, in part, in Appendix E to the Petition.) The potential evils which could flow from such

concealment of information are obvious and we do not dwell upon them here.

At an earlier phase of the litigation brought by HOOVER (Petition, p. 4), this same question of privilege came before Chief Judge Adrian A. Spears of the United States District Court for the Western District of Texas in connection with a deposition then being taken at Kelly Air Force Base, Texas. Judge Spears made no ruling on the point, stating he believed the matter should be dealt with by the trial Judge in the HOOVER litigation, in California. In his deliberations which were brought to the attention of the Court of Appeals, however, Judge Spears made the following remarks, which we submit are a most eloquent statement of reasons supporting the *contra* side of the issue of confidentiality:

> "The first reaction I had when I read this was that certainly if there ever was a privilege it was waived, but now I find that the king can not only do no wrong but the king can do a wrong and still not be wrong. So, I just don't know. I know we have to do a lot of things in government to protect people who lack the courage to tell the truth. It is really a sad commentary, though, that you have to provide them with all the confidentiality and everything else, just to tell the truth about what happened in a situation, and I am not sure that this doesn't encourage people to fabricate and to lie in one hearing and then come in, clothed with either immunity or confidentiality, and finally be prevailed upon to tell the truth. Maybe that is necessary, and I guess in dealing with people unusual methods are necessary in order to get to the facts, and I am not going to even debate the proposition that it is necessary for the Air Force or for any other agency of the government to learn the truth, but it is a deplorable commentary upon our system when we have to have a governmental agency either participate in sham and

false information on the one hand and then go into a closed session and get the truth on the other and then deprive people whose interests are affected thereby of access to both. A person can go into this collateral investigation, apparently, and lie through his teeth and then a litigant for whose benefit that testimony is given can use it, but the same witness may go into the investigative situation and, clothed with confidentiality and privilege and immunity, tell the truth, which is absolutely contrary, and that witness not only receives immunity but perhaps is not subjected to any disciplinary action or anything else; so, they are permitted to protect the interests they might personally have, even though they lie in one instance and tell the truth in another."

In the circumstances, we believe the Court of Appeals was eminently correct in refusing to recognize the privilege claimed by Petitioner for purely factual statements, and that the Court of Appeals was also correct when it suggested (Petition, Appendix A, p. 17A) the proper course for the Air Force to follow would be to present its case to Congress. The Congress could then properly balance the Air Force claim of future need against the public interest and the compelling need for maximum disclosure of information that does not involve the national defense and security of the United States.

Summary of Argument.

As noted by the Court of Appeals it appears the correct remedy here, if a remedy is needed, is for the Air Force to seek legislation both protecting Air Force Accident Investigations and providing necessary subpoena power, thereby properly leaving to the Congress the responsibility for determining and providing the Air Force such relief as it may genuinely need. The exercise in judicial legislation urged

by Petitioner here should neither be countenanced nor indulged.

The legislative history and the legislation favoring disclosure of information, the contemporary cases, and this Court's opinion in *Merrill*, Respondent submits, are persuasive. The legislative mandate of the Act, we believe, was written expressly to cure the enigmatic and, as here, the sometimes seriously prejudicial effects of the policy of nondisclosure urged by Petitioner. While national security considerations or potential conflicts violating the time honored doctrine of Separation of Powers may indeed be reason for recognizing executive privilege, neither can be demonstrated here. And, neither is it enough for Petitioner to invoke Exemption 5 claiming promises of confidentiality allegedly springing from Air Force Regulations in effect on October 9, 1973, when in fact, there is no regulatory basis for the promise and no reasonable basis for the confidentiality. Accordingly, we submit, certiorari should be denied.

Should the Court in its discretion be inclined to grant certiorari, it is respectfully suggested the judgment of the Ninth Circuit Court of Appeals be affirmed thus inviting legislation, if there is a compelling need, once the Fifth, Eighth and Ninth Circuits have been thus reconciled.

Respondent Mills respectfully submits this Court provided its analysis of the legislative intent of the Act in its decision in *Merrill* and the Court of Appeals correctly interpreted and applied *Merrill* to the facts of the instant case.

Conclusion.

The decision of the Court of Appeals should be affirmed, should this Court choose to grant certiorari. In the event this Court is inclined to withhold its Writ of Certiorari, in its discretion, Respondent Mills respectfully suggests it would be wholly appropriate to do so thereby permitting the de-

cision of the Court of Appeals to stand and leaving it to the Congress to provide such remedial legislation as the Air Force may demonstrate it needs.

Dated: May 31, 1983.

Respectfully submitted,

LAWRENCE J. GALARDI,
DEAN F. COCHRAN,
Attorneys for Respondent,
Mills Manufacturing Corporation.